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SUPREME COURT, U.S.

(7)

No. 06-233

IN THE

Supreme Court of the United States

STACY A. GIBSON,

Petitioner,

v.

ADA COUNTY, *et al*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO

PETITION FOR REHEARING

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CERTIFICATION OF COUNSEL

Pursuant to Rule 44 of the U.S. Supreme Court, I hereby certify the attached Petition For Rehearing is not presented for delay, is restricted to the grounds specified in Rule 44(2), and presented in good faith.

November 24, 2006

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Attorney For Petitioner

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PETITION FOR REHEARING

Introduction

Pursuant to Rule 44, U.S. Supreme Court Rules, Petitioner does request this Court reconsider its Order of October 30, 2006, denying the Petition For Writ Of Certiorari. This Petition For Rehearing is submitted upon Rule 44(2), as Petitioner does believe intervening circumstances exist which may have a substantial effect upon this matter, and Petitioner's concern is she may not obtain the relief required in any other form as being sought through this Court.

INTERVENING CIRCUMSTANCES

On July 5, 2005, while awaiting decision from the direct appeal to the Idaho Supreme Court from those consolidated proceedings in *Gibson v. Ada County, et al.*, 142 Idaho 746, 133 P.3d 1211 (2006), Petitioner filed an action under the two-year statute of limitations to preserve her claim against Ada County. That proceedings was filed in the United States District Court, District of Idaho (*Gibson v. Ada County, et al.*, CV05-263-S-EJL), pertaining to the July 2, 2003 denial of a due process procedural hearing. That suit was brought under the Civil Rights Act, 42 U.S.C. § 1983, and came into being from Ada County's intentional denial of Petitioner's constitutionally vested right under the 14th Amendment of the U.S. Constitution to engage adequate state procedural due process, a denial of equal protection, and denial of a right to access state courts to secure judicial review of property rights, which was being denied under color and pretense of state law, in **deliberate violation** of federal law.

On March 1, 2006, Petitioner amended that federal action, to include the state's failure to provide adequate procedural due process, as determined from the February 9, 2006 Idaho Supreme Court decision in *Gibson v. Ada County, et al., supra.*

Prior to filing that Title 42 claim in U.S. District Court, Petitioner had incessantly challenged the policies, procedures and actions of Ada County, its Sheriff's and its Board of

Commissioners, but with no success at the state court level. Those Respondents not only denied Petitioner a constitutionally guaranteed right to adequate due process administrative review procedures, but deliberately denied Petitioner any lawful means to raise the facts, merits and issues with an agency to allow access for judicial review with a court to challenge the wrongful conduct.

On March 1, 2006, the U.S. District Court entered a Memorandum Decision and Order (*Appendix* 589a-604a), dismissing the action based upon issue-claim and *res judicata-collateral estoppel* defenses, and stated:

> "Because the claims and issues presented here were previously raised, argued, and finally decided on the merits in the prior state court actions between these same parties and/or those in privity, they are precluded and the motion to dismiss shall be granted". *Appendix* 599a.

The federal court surmised the manner in which Petitioner stated the historical events in the state court cases, was "a basis upon which Gibson seeks recovery" in this matter. *Appendix* 601a.

The federal court appears to have accepted the argument presented by Ada County, which stated:

> "Gibson is merely reiterating issues that she unsuccessfully presented at the state court level. Since she has been dissatisfied with her previous results, she now wants this Court to step in and override the state court proceedings".

The Idaho courts have denied Petitioner her rights under the Due Process Clause and Equal Protection Clause, and it was believed the federal court, as a matter of law, is compelled to step in and override proceedings when a state court fails to provide constitutionally adequate procedural due process remedies. The U.S. District Court in Idaho, however, has failed to do so.

With its March 1, 2006 Memorandum Decision and Order, the U.S. District Court advanced a supposition Petitioner should

not be allowed to seek redress in federal court from procedural due process violations that occurred by state action, believed to be contrary to federal law.

From that March 1, 2006 Order, it is Petitioner's belief courts situated in Idaho may not possess a similar appreciation of the meaning of the Due Process Clause of the U.S. Constitution, as do federal courts in other circuits. When the Idaho courts fail to provide adequate procedural due process remedies, the analysis of the Federal District Court should have been to have found state courts denied Petitioner any adequate state procedural due process, and federal courts had the authority and duty to correct that infringement of the U.S. Constitution, under existing established federal case authority.

Petitioner has thus far found no success (by either state or the local federal court) in any effort to secure any remedy to satisfy and protect her rights under the Due Process Clause and the Equal Protection Clause of the U.S. Constitution. She believes the lack of relief from both state and local federal court does particularly exemplify how governmental agencies in Idaho may have a judiciary to be over protective of public agencies.

These wrongful acts against Petitioner now include the following:

> **(1)** Denial of procedural due process when unilaterally placed on administrative leave, without pay, by the County Sheriff's Office, with no notice or hearing, which is deemed by federal law to be *de facto* termination when not providing procedural due process. *See Gilbert v. Homar*, 520 U.S. 924, at 930 (1997); *Homar v. Gilbert*, 89 F.3d 1009, 1015 (3rd Cir. 1996);
>
> **(2)** Denial of procedural due process by avoiding a pre-termination hearing, a prerequisite under federal law. *See Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487 (1985);

(3) Denial of procedural due process by denying the opportunity to engage an **unbiased** post-termination hearing with an **unbiased** tribunal, instead of a County agent;

(4) Denial of any procedural due process by denying an administrative agency review to challenge the non-established basis to terminate Petitioner's employment;

(5) Denial of procedural due process by failing to provide any forum to access judicial review of the termination, either by Petition For Judicial Review to a lower court, appellate review to the Idaho Supreme Court, Petition For Declaratory Judgment, Petition For Writ Of Mandamus, or Petition For Writ Of Certiorari to the Idaho Supreme Court;

(6) Denial of procedural due process by failing to provide adequate judicial review forum with an Idaho court under the *Fair Labor Standards Act* (FLSA), 29 U.S.C. § 201 *et seq.*, to enforce the "right of action" to recover overtime and regular wages due Petitioner, and seek redress for the retaliatory conduct when depriving Petitioner of her federal statutory "right of action" under FLSA; and,

(7) Denial of procedural due process by failing to provide an adequate judicial review forum with an Idaho court under the *Civil Rights Act*, 42 U.S.C. § 1983, causing need to address this uncertainty by federal assistance;

ARGUMENT

In *Gibson v. Ada County, et al.*, 142 Idaho 746, 133 P.3d 1211 (2006), the Idaho Supreme Court agreed that pursuant to the Ada County Merit System, Petitioner was classified and tenured, could be terminated only for cause, and such a termination **must** be subject to adequate state procedural due process review, as a matter of federal law. Petitioner has been denied any adequate state (and now federal) procedural due process remedy to review the official action undertaken by

Respondents, and has been denied review of the violations of her due process rights and equal protection rights under the 14th Amendment to the U.S. Constitution, when said rights are protected and actionable under 42 U.S.C. § 1983.

Procedural due process analysis was decided by the U.S. Supreme Court in *Zinermon v. Burch*, 494 U.S. 113, 125 (1990), when it affirmed the Due Process Clause encompasses a guarantee of **fair procedure**, and stated when, in procedural due process claims, state action, without providing due process of law, serves to deprive an individual of a constitutionally protected interest in "life, liberty, or **property**", such state deprivation of a tenured property right is unconstitutional. Procedural due process rules are meant to protect persons, not from the deprivation, but from the mistaken or **unjustified** deprivation of life, liberty, or property. *See Carey v. Piphus*, 435 U.S. 247, 259 (1978).

A constitutional violation actionable under 42 U.S.C. § 1983 is not complete (actionable) **unless** and **until** the **state fails to provide due process**. In *Zinermon*, 494 U.S., at 125-126. Justice Blackmun stated:

> "The constitutional violation actionable under § 1983 is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process. Therefore, to determine whether a constitutional violation has occurred, it is necessary to ask **what process the State provided, and whether it was constitutionally adequate**. This inquiry would examine the procedural safeguards built into the **statutory** or **administrative procedure** of **effecting** the **deprivation**, and any remedies for erroneous deprivations provided by statute or tort law."

Federal courts rely on *Zinermon*, 494 U.S., to determine procedural due process violations and when the **accrual** of the action begins. In **all** of these **cases**, the federal courts **affirmed** a procedural **due process violation does not occur** and is therefore **not actionable unless** and **until** the **State**

fails to provide due process. *See Bayer v. Town of Peshtigo*, Case No. 05-C-661, at 7, United States District Court, E.D. Wisconsin, September 11, 2006; *Koltonuk v. Borough of Laureldale*, Civil Action No. 05-0106, at 14-15, United States District Court, E.D. Pennsylvania, July 18, 2006; *Day v. Borough of Carlisle*, Civil Action No. 1:CV-04-1040, at fn7, United States District Court, M.D. Pennsylvania, July 10, 2006; *Price v. City of Ormond Beach*, Case No. 6:05-cv-1064-Orl-31KRS, at 8-10, United States District Court, M.D. Florida, Orlando Division, May 19, 2006; *Belas v. Juniata County School Dist.*, Civil Action No. 1:CV-04-505, at 14, United States District Court, M.D. Pennsylvania, August 26, 2005; *Kildare v. Saenz*, 325 F.3d 1078, at 1085-1086 (9th Cir. 2003); *Jackson v. City of Stone Mountain*, 232 F.Supp.2d 1337, at 1368 (N.D. Ga. 2002); *Cotton v. Jackson*, 216 F.3d 1328, at 1331 (11th Cir. 2000); *Horton v. Bd., Cnty. Com'rs, Flagler Cnty.*, 202 F.3d 1297, at 1300 (11th Cir. 2000); *McDaniels v. Flick*, 59 F.3d 446, at 459 (3rd Cir. 1995); *Sierra Lake Reserve v. City of Rocklin*, 938 F.2d 951, at 956 (9th Cir. 1991).

Petitioner has been denied any adequate state procedure to remedy the due process and equal protection violations under the Due Process and Equal Protection Clause of the 14th Amendment to the U.S. Constitution. That fact came to light when the Idaho Supreme Court issued its decision February 9, 2006, and then closed the door when denying rehearing by its order of May 9, 2006.

The Merit System under which Petitioner was employed is a County policy created under the authorization of the Idaho Constitution and Idaho law, vesting County employees with property rights in their employment, and provides prescribed conduct for County officials whenever they choose to terminate an employee vested with permanent classified employment status. *See also Piatt v. MacDougall*, 773 F.2d 1032, 1036 (9th Cir. 1985).

The procedural **due process violation** of Petitioner's constitutional rights **did not** begin to **accrue** at the time of termination on December 27, 1999, or from the February 15, 2000 decision of the County's officer. Unfortunately, that has been suggested by the Idaho district court, the Idaho appellate court, and because of that, declared the *res judicata-collateral estoppel* defense that has now been applied in the U.S. District Court. Rather, as a matter of federal law, Petitioner's cause of action could only accrue once Petitioner has been absolutely denied state procedures, and no adequate procedure has been prescribed by Ada County, by the Idaho lower courts, by the Idaho Supreme Court, or by the U.S. District Court, which is now on appeal to the 9th Circuit Court of Appeals (Docket No. 06-35600). Only once it has been confirmed there exists **no** adequate **state** procedural due process available, does the action come into being. It appears clear that on May 9, 2006, the Idaho Supreme Court denied Petitioner any procedural state due process when it denied the Petition For Rehearing, and that established an accrual for Respondents' ongoing denial of due process rights. *See Day v. Borough of Carlisle*, supra, at fn 7); *Price v. City of Ormond Beach*, supra, at 9-10; *McDaniels v. Flick*, 59 F.3d, at 461 (3rd Cir. 1995).

Constitutional violations of Petitioner's rights actionable under § 1983 during either pre-termination or post-termination periods are not deemed complete until the state has failed to provide adequate procedural due process, and therefore, Petitioner's cause of action for due process violations could not accrue at the time she was placed on administrative leave, or on the date of the written order of termination on December 27, 1999 or on February 15, 2000.

Other U.S. District Courts, such as in the matter of *Terlecky v. City of Ruidoso Downs*, Case No. CIV 04-1121 BB/DJS, United States District Court, D. New Mexico, January 24, 2006 and March 27, 2006, show judicial concern and respect when protecting employees against violations of

rights under the Due Process Clause and the Equal Protection Clause, actionable under 42 U.S.C. § 1983. Those federal courts have confirmed those violations are **not complete** (actionable) **unless** and **until** the **state fails to provide due process**. *See also Hicks v. Jackson County Commission*, Civil Action No. CV-03-S-2858-NE, United States District Court, N.D. Alabama, Northeastern Division, June 23, 2005; *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994).

Of great interest, in *Terlecky*, the city had an established employee merit system with a provision that allowed appeal to state district court from termination decisions of the city council, though no authorization existed for such an appeal in their state statute. *Id.* 4. Analogous to the outcome of the matter decided by the federal court in *Terlecky*.

Though Petitioner was never provided a "pre"-termination hearing required by *Loudermill*, of curious note, the Idaho Supreme Court held "Gibson was given a pre-termination hearing by way of the hearing conducted on February 15, 2000". Not only was there a series of *de facto* terminations in July and August 1999, created substantially prior to the written decision of termination on December 27, 1999, Gibson was never provided any "pre-termination" procedure hearing prior to the *de facto* termination(s) or her "formal written termination" of December 27, 1999, and any suggestion the February 15, 2000 "hearing" (that actually occurred on January 25th & 26th, 2000), took place **after** the written termination, and any "pre"-termination contention, is a fallacious perception of the facts. The U.S. Supreme Court in *Loudermill* held that although an employee had a "constitutionally adequate" post-termination hearing, it did not remedy a **constitutionally inadequate** pre-termination hearing. Post-termination hearings, no matter how elaborate, do not relieve the employer of providing pre-termination procedural protections noted in *Loudermill*. *See McNulty v. Sandoval County*, No. CIV 05-221 BB/ACT, United States District Court, D. New Mexico, August 15, 2005.

Furthermore, the February 15, 2000 decision was not rendered by an unbiased tribunal. It was the County's seal of approval from their own employed official, who chose to create an additional basis to terminate, demonstrating his zeal for County loyalty, failing to provide Petitioner notice or constitutional due process. Of interest, the Idaho Supreme Court declared the Merit System procedural process infirm, and notably, no procedural due process was thereafter forthcoming from the authorized agency, nor adopted or approved by the County.

Petitioner has been seeking a court imposed injunction requiring reinstatement of her classified employment with full rank, seniority, benefits, privileges, entitlements, and back pay, retroactive to the first *de facto* termination, if not the later written decision of termination December 27, 1999. Petitioner is entitled to all overtime wages owed from October 16, 1998 to July 20, 1999, wages owed from August 25, 1999 to December 27, 1999 (the wrongful leave status), and compensation for costs and fees incurred in the preservation of Petitioner's rights.

In *Hansen v. White*, 947 F.2d 1378 (9th Cir. 1991), sheriff office employees initiated an appeal after the U.S. District Court (Idaho) incorrectly stated the law and created harm and prejudice to those employees. In *Hansen v. White*, 114 Idaho 907, 762 P.2d 820 (1988), the 9th Circuit put forth the following certified question to the Idaho Supreme Court:

> "Under Idaho law, have the county commissioners authority to institute a merit system binding county officers, particularly the sheriff, under which such officers may not terminate deputies and other employees in their department except for cause"?

The Idaho Supreme Court in *Hansen v. White*, 114 Idaho 907, 762 P.2d 820 (1988), answered the 9th Circuits' certified question, addressing that after county commissioners had enacted a merit system that protects permanent employees, an elected sheriff may **terminate** a deputy vested with property

rights for **good cause only**, subject to adequate state procedural due process remedies, equal protection, and judicial review, all of which Petitioner has been denied.

Hansen (114 Idaho 907) stated (at page 911):

> "The board of county commissioners has the statutory authority to create a reasonable county merit system, and such an act is a **valid legislative exercise** of its **express power** to promote the general welfare of the county".
>
> "Thus, once a deputy attains "permanent" status under the merit system, the deputy is no longer an employee "at will." Consequently, the **sheriff's implied power** to terminate employees **without cause**, which arises from the common law, not the constitution, **is** superceded **by the merit system**." (at page 913). (Emphasis added).

Under such merit system created by Ada County pursuant to *Idaho Code*, § 31-714, Petitioner could be terminated only for **"good cause"**, and that termination **must** have a right to **adequate** procedural **due process**, **equal protection** and **judicial review** of that deprivation of a property right.

CONCLUSION

Petitioner has been denied relief in state court and now in federal court (though on appeal to the 9th Circuit), and due to these intervening concerns of ongoing denial and uncertainty of an appeal, Petitioner does request this Court grant Petition For Writ Of Certiorari, to avoid the potential of conflicting circuit opinions, and take the matter now, rather than await the uncertainty of the appeal process at the 9th Circuit.

Respectfully submitted,

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